# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1305

JARVIS E. GOOCH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A 8–12; II R. 248–253)[1] is not yet reported. An earlier opinion of the court of appeals, subsequently withdrawn, is also included in the appendix to the petition (Pet. App. A 1–6; II R. 239–245).

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1969 (Pet. App. A 13; II R. 254). The petition for a writ of certiorari was filed on April 23,

[1] "R." preceded by volume number designates the two-volume record on file with the Clerk of this Court.



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1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether petitioner was properly convicted for violation of provisions of the Internal Revenue Code relating to illegal distilling operations.

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on three counts of a five count indictment charging illegal distilling operations in violation of the Internal Revenue Code.[2] Count one charged carrying on the business of a distiller without having posted bond (26 U.S.C. 5601(a)(4)); count two, illegal production of mash (26 U.S.C. 5601(a)(7)); and count three, illegal production of distilled spirits (26 U.S.C. 5601(a)(8)) (IR. 1–3, 4, 29). On May 8, 1967, petitioner was sentenced to concurrent terms of one year's imprisonment on counts one and two, and, on count three, to one year of probation, to commence after the completion of his prison term (IR. 30–32). The court of appeals affirmed (Pet. App. A 8–12).

[2] Three others were tried together with petitioner. Roy Lance and Freeman W. Rider were acquitted on all counts; Timothy Lance was acquitted on count two and three; and petitioner was acquitted on counts 4 and 5 charging the possession of 413 gallons of alcohol which did not have the requisite stamps and carrying on the business of a distiller with the intent to defraud the United States of the tax imposed thereon (IR 29–30).

The evidence is summarized in the opinion below (see Pet. App. A 8–9). In relevant part, it showed that at about 8 p.m. on the evening of July 14, 1966, four agents arrived at a recently discovered illegal distillery in Lumpkin County, Georgia. The still was located in woods adjacent to the residence of the mother of two of the defendants (Roy and Timothy Lance) (IR. 87, 96, 115). While two of the agents were examining the still site they saw petitioner coming down the path. After doing "something" to an electrical switch in the area of a nearby spring, petitioner proceeded to the distillery site with his flashlight and was there arrested (IR. 116, 123–124, 87–88). The evidence further showed that there was a switch box near the spring, containing an electric power source which could be activated to pump water into the Lance residence (IR. 98–99). This power box could also be used to activate a pump at the distillery to pump liquor from a large metal tank through a hose running to a nearby shed (IR. 99). At trial, petitioner testified that just before his arrest he had fixed the water pump by putting a fuse in the switch box (IR. 147–149, 150). Moments after petitioner's arrest the alcohol pump was running and the level in the tank was down about an inch, indicating that it had been activated only moments before (Pet. App. A 9; IR. 116–117, 88–89). The still itself had just finished operating (IR. 95). At the still site the officers found 4 fifteen hundred gallon still pots and about forty-five hundred gallons of mash fit for distillation (IR. 93–94, 108, 121).

In his instructions to the jury, the trial judge charged as to count one (the "carrying on the business" count) that if

> * * * a defendant is shown to have been at the site of the place where and at the time when such offense was being committed, the presence of such defendant at said time and place shall be deemed sufficient to authorize a conviction, unless the facts and circumstances and evidence explains such presence to the satisfaction of the jury.
>
> Of course, if his presence there, if anyone was present, is believed by you to be for some innocent purpose, then the rule would not apply.
>
> This does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict such defendant if the evidence in the case and the facts and circumstances proved failed to explain his presence to the satisfaction of the jury, it simply means that the jury may, if it sees fit, convict upon such evidence, and it shall be deemed sufficient in law to authorize a conviction, but does not require such a result. [Inst. 10–11.] [3]

**ARGUMENT**

The court of appeals properly upheld petitioner's conviction for carrying on the business of a distiller as charged in count one. The circumstances in which an inference of guilt may permissibly be drawn from presence [4] with regard to that offense was correctly

[3] "Inst." refers to a copy of the court's instructions which we are filing herewith.

[4] The court below found that the "evidence showed Gooch's presence at the still beyond any question" (Pet. App. A 10), and the record supports that conclusion.

set forth in the trial court's instructions, and the rationality of that inference was squarely sustained by this Court in *United States* v. *Gainey,* 380 U.S. 63. The fact that petitioner at trial offered an explanation for his presence did not make the instruction any less valid (see Pet. 7–8). As the trial judge pointed out, it was for the jury to decide whether petitioner was present "for some innocent purpose" (Inst. 10). The further contention that the inference is invalid under the self-incrimination clause of the Fifth Amendment was also rejected in *Gainey, supra,* 380 U.S. at 71, and petitioner submits no reason why that decision should be reexamined. *Miranda* v. *United States,* 384 U.S. 436 is inapposite, since that case relates to the entirely different question of voluntariness of statements made in the context of custodial interrogation.[5]

Petitioner's conviction under count three—unlawful production of liquor on which the federal tax had not been paid—was also valid in the circumstances. The jury was not instructed that they could convict on this charge on the basis of presence alone. Accordingly, it would be inappropriate to decide in this case whether the statute rationally authorizes the jury to convict a defendant for illegal production of distilled spirits (26 U.S.C. 5601(a)(8)) when it finds that he has failed sat-

[5] Petitioner does not challenge the court of appeals' failure to review his conviction under count two—illegal production of mash fit for distillation—upon which he received a concurrent sentence. Accordingly, there is no reason to defer ruling on the instant petition pending this Court's decision in *Benton* v. *Maryland*, No. 201, this Term, involving the question of the continuing validity of the concurrent sentence doctrine.

isfactorily to explain his presence at the place where such spirits are being produced (26 U.S.C. 5601(b)(4))—an issue which was before this Court but not decided in *United States* v. *Romano,* 382 U.S. 136. There was, as the court of appeals held, sufficient evidence independent of the inference to support the jury's verdict. Petitioner was present at the switch box which controlled the liquor pump at about the time the evidence suggests that pump was in fact activated; the jury could reasonably conclude that it was petitioner who started that pump in operation (See Pet. App. A 11–12).[6] Such activity would be encompassed within any reasonable construction of the statutory provision relating to production of liquor.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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[6] The testimony of one of the agents suggesting that the water tank had been activated after the agents came upon the scene (I R 100–101, 122) is consistent with petitioner's version that he had activated the water pump. However, this is not inconsistent with the conclusion that petitioner had also activated the liquor pump. See, for example, petitioner's own testimony that the liquor pump went on just *after* his arrest (I R 152).

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